No. 21991

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN CLIFFORD JAMES

Appellant,

vs.

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin,

Appellee.

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, U.S.C., section 2241. The jurisdiction of this Court to review the denial of the writ is conferred by Title 28, U.S.C., section 2253, which makes the final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF PROCEEDINGS

This is an appeal from an order dated April 13, 1967, by the Honorable Alfonso J. Zirpoli, United States District Judge for the Northern District of California, denying the petition for writ of habeas corpus filed by John Clifford

James, petitioner and appellant (RT 38-40).[1] This is the second time that this matter has come before this Court in the aftermath of the following proceedings:

A. Proceedings in the state courts.

On August 27, 1959, appellant was convicted of violating California Penal Code section 211 (robbery) in the Los Angeles Superior Court, after a trial by jury, in which he was represented by counsel, and was sentenced to state prison for the term prescribed by law. Appellant did not appeal from this conviction (RT 6-7).[2]

Subsequently he filed several petitions for writ of habeas corpus in the California state courts, all of which were denied without opinion (RT 7-8).

B. Proceedings in the federal courts.

On August 27, 1965, appellant filed an application for writ of habeas corpus in the United States District Court for the Northern District of California. That same day an order to show cause was issued by the district court.

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1. The transcript of record in three volumes is designated herein as "RT." Unless otherwise indicated, all "RT" references, standing alone, refer to volume I. However, since volumes II and III which contain the record of the state trial proceedings, are also each paginated beginning with page 1, they are designated here, e.g., RT II-1, RT III-3.

2. The facts of record are that appellant was charged with having committed two grocery store holdups in Los Angeles with one William D. Bates. However, the jury convicted appellant only of the robbery in which the grocery store owner was able to make positive identification, the other victim being unable to state that appellant was the robber (RT Vol. II, III).

On August 30, 1965, appellant moved to withdraw his petition, a request which the district court granted on September 3, 1965 (RT 8).

On September 15, 1965, appellant moved to withdraw his motion to withdraw his original petition. The district court, on October 7, 1965, issued an "Order Denying Request to Reopen Case" on the ground that the only substantial federal question raised in the original petition was that appellant was interrogated by the police in violation of the rule announced in Escobedo v. Illinois, 378 U.S. 478 (1964), and, that the Escobedo decision did not operate retroactively to affect convictions which had become final prior to June 22, 1964 (RT 8).

Appellant appealed from this decision of the district court and following the issuance of a certificate of probable cause, the matter came before this Court. This Court, on October 10, 1966, ruled that although the district court correctly rejected appellant's petition insofar as it was based on a violation of Escobedo, two remaining allegations contained in the petition required further review by the district court. Thus, this Court reversed and remanded the case to the district court to determine whether appellant's conviction was based in part upon (1) oral admissions obtained from appellant by the use of threats and physical violence, and (2) the confession of an accomplice who was

not produced for cross-examination (RT 1-2).[3/]

On January 6, 1967, the district court issued its order to show cause pursuant to the ruling of the Court of Appeals (RT 3). At the same time it also issued its order denying a petition for bail filed by appellant (RT 4). On January 31, 1967, appellee filed its return to the order to show cause with points and authorities in support (RT 6-18). Concurrent with the filing of its return appellee also filed the transcript of the record proceedings of appellant's trial at Los Angeles (RT Vols. II, III). On February 16, 1967, appellant filed a reply brief and a letter request for counsel (RT 20-24), and on March 14, 1967, he again filed a request for counsel (RT 25-28). On March 31, 1967, appellant also filed a supplemental reply brief (CT 29-37).

Following the submission of these documents, as well as appellee's appearance before the court, the district court issued its order denying the petition for writ of habeas corpus and dismissing the proceedings (CT 38-40). In so ruling upon appellant's petition, the court first held that appellant's contention that oral admissions were obtained by the use of threats and violence was without merit. Thus, the court noted that the record of the trial disclosed that Police Officer Rainey who interrogated

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3. The Court's opinion is reported at James v. Wilson, 367 F.2d 386 (9th Cir. 1966).

appellee when the incriminatory statements were obtained, also testified that he did not use force, violence, threats or promises to obtain appellant's admissions. Despite this testimony and the fact that appellant testified in his own defense, appellant at no time placed in issue these facts, nor, in the course of the habeas corpus proceedings, had he ever offered any explanation for his failure to do so. Indeed, although appellant testified as to the events which occurred after his arrest, at no time did appellant testify that threats or violence were used against him to coerce admissions of guilt (RT 39).

As the district court also noted, the only possible hint of coercion came in appellant's testimony that the police officers had told him that he was "chicken" because he did not have the "guts" to "clean up their books." Although Officer Rainey denied making this statement, the district court held, that even assuming arguendo, that it was made, such statements do not amount to the type of coercion which would "overbear the will of petitioner." citing Haynes v. Washington, 373 U.S. 503 (1963). The court also noted that this was true even when viewed with awareness that appellant was not warned of his constitutional right to remain silent at a time prior to the June 22, 1964, date for the prospective application of the rule set forth in Escobedo v. Illinois, supra.

The district court further ruled that appellant's contention that his accomplice's confession was introduced into evidence contrary to his constitutional right of confrontation and cross-examination, was equally without merit. The district court held that the record disclosed that the confession alleged to be that of appellant's co-defendant, was in fact introduced under the California rule of evidence which allows the introduction of a confession of a co-defendant as that of the defendant where there has been an adoptive admission by the affirmative conduct of the defendant. Moreover, as the court also noted, the record disclosed that the jury was not permitted to take the statement of appellant's accomplice to the jury room with them and were also instructed to determine whether the defendant's conduct in response to the alleged confession of his accomplice constituted a confession, and admission, or neither. Accordingly, the court ruled that the constitutional right of confrontation and cross-examination set forth in Pointer v. Texas, 380 U.S. 400 (1965) and Douglas v. Alabama, 380 U.S. 415 (1965) did not apply.

Thereafter, on June 5, 1967, the district court issued an order granting the certificate of probable cause to appeal (CT 48-49) in accordance with appellant's request (CT 41-47). The court also issued its order granting appellant permission to appeal in forma pauperis (CT 50). On

June 9, 1967, appellant filed a notice of appeal with this Court (CT 54-57), and this appeal follows.

The questions involved in this appeal are as follows:

1. Whether the district court properly ruled that appellant's contention that oral admissions were obtained from him by the use of threats and violence is without merit.

2. Whether the district court properly held that appellant's contention that his accomplice's confession was introduced into evidence contrary to his constitutional right to confrontation and cross-examination, is equally without merit.

3. Whether the district court properly refused to hold an evidentiary hearing and to appoint counsel for appellant in the proceedings.

ARGUMENT

I.

APPELLANT'S CONTENTION THAT ADMISSIONS WERE OBTAINED FROM HIM THROUGH THE USE OF FORCE AND VIOLENCE IS WITHOUT MERIT.

Before turning to the primary issues raised by this appeal, it should be noted at the outset that appellant's attempt to again renew the contention that he is entitled to habeas corpus relief because he was interrogated by the police in violation of the rule announced in Escobedo v. Illinois, supra, must be rejected (AOB 5-9).

In the per curiam opinion previously issued in this case, this Court held that "in the light of Johnson v. New Jersey, 384 U.S. 719 (1966), the district court correctly rejected appellant's petition for habeas corpus insofar as it was based upon Escobedo v. Illinois, 378 U.S. 478 (1964)" (RT 1). Having previously decided this point adversely to appellant, appellant is now barred from again raising that issue here. Browning v. Crouse, 327 F.2d 529, 531 (10th Cir. 1964), cert. denied, 384 U.S. 973 (1966). Indeed, an alleged failure to receive a warning of constitutional rights is relevant to this case only insofar as it bears upon appellant's contention that oral admissions were obtained from him through the use of force and violence. Johnson v. New Jersey, supra, at 730. As to this issue, however, appellant's contention is totally lacking in merit as the district court properly concluded when viewed in the light of the record of the state trial proceedings.

Thus, the record of the state trial proceedings shows that appellant was charged with having committed two grocery store holdups with an accomplice William D. Bates (RT Vol. II). A part of the evidence establishing appellant's guilt was the testimony of Maurice T. Rainey, a police officer for the City of Los Angeles who testified that appellant orally admitted his participation in the grocery store holdup on two separate occasions.

Thus, Officer Rainey testified that after appellant was arrested, he questioned appellant twice at the Newton Street Station where appellant had been taken for booking following his arrest. The two conversations took place on May 26, 1959, at 1:30 p.m. and 2:30 p.m. respectively. During the first conversation appellant denied taking part in either of the two robberies with which he was charged. However, the second time that Officer Rainey spoke with appellant, appellant orally admitted his complicity in the grocery store holdups (RT Vol. II 29-32, 37).

The next morning, at 9:50 a.m. in Room 606 at the Record Office of the Superior Court Criminal Clerk in the Hall of Justice, appellant again admitted his guilt when Officer Rainey showed appellant the written confession that his accomplice Bates had signed. When shown Bates' confession, which set forth the details of the robbery and implicated appellant, appellant stated that his accomplice's confession of guilt was correct except for the fact that he and Bates had split the money evenly, rather than he (appellant) receiving more of the money in the one robbery as Bates had stated (RT 10-11, 15-16; RT Vol. II, 33-40).

Now, in these habeas corpus proceedings appellant claims that these admissions were obtained through the use of threats and force. Although appellant has never been clear as to which admission he is attacking, (or that the

admissions obtained on both occasions were based upon threats and violence[4/] it is clear that neither of the admissions was obtained through threats or force. On the contrary, the record of the state trial proceedings coupled with appellant's complete failure to "explain away" the implications of that record, render his charges completely without merit.

Thus before testifying as to any of the admissions made by appellant, Officer Rainey stated that neither force nor threats were used against appellant, nor were promises of leniency made, but, on the contrary, the admissions made by appellant were freely and voluntarily made (RT II, 29, 31, 34). Despite this testimony, appellant represented by counsel, did not raise an issue of involuntariness at any time during the trial.[5/] Instead, appellant denied any

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4. For example, in his brief here, appellant states that while threats were made against him during the interrogation at the Newton Street Station on May 26, 1959, he "consisently denied any knowledge of these crimes" at that time. It was not until the following day, May 27, 1959, when he was informed of his accomplice's confession, that he was so beaten that he was 'forced' to make an oral admission to these crimes to relieve some of the physical agony reaped upon him by the police officers" (AOB 3-4).

5. Thus, it may be noted that although the district court did not base its decision on this ground, it seems clear that by failing to raise this point at trial, appellant has deliberately bypassed adequate state remedies. Nelson v. California, 346 F.2d 73 (9th Cir. 1965), cert. denied, 382 U.S. 964 (1965); Eskridge v. Rhay, 345 F.2d 778 (9th Cir. 1965), cert. denied, 382 U.S. 996 (1966). Similarly, in failing to appeal his conviction, he

participation in the holdups and although he described the events which occurred after his arrest, he was silent concerning the admissions to which Officer Rainey testified. Indeed, appellant denied even seeing Bates' confession until the preliminary examination, although he testified that Officer Rainey had previously told him about it (RT II 46-61, 52-53).

The only possible hint of coercion came in appellant's testimony that Officer Rainey and Officer Williams told him that he was "chicken because he did not have the 'guts' to clean up their books." (RT II 53-54). Officer Rainey, however, who was specifically recalled to the stand to testify as to this alleged "coercion," denied making such a statement (RT II 61-62). As the district court held, however, even assuming arguendo that Officer Williams in fact made these statements, such a statement clearly does not amount to the type of coercion which would "'overbear' the will of appellant," Haynes v. Washington, 373 U.S. 503 (1963), even when viewed with the fact that appellant did not receive an Escobedo-type warning as to his constitutional right to counsel or to remain silent.

Accordingly, we submit, that based as they are

Ftn. 5 Contd.

deliberately bypassed adequate state remedies, albeit he asserted in his petition that he did not know "the proper way of filing for an appeal" (Pet. 3).

upon a proper view of the law and of the record, the district court's conclusion that appellant's allegation of coercion was without merit, as a matter of law, is fully supported by the record. Thus, with full opportunity to raise the issue of coercion at his trial eight years ago, and despite the affirmative evidence introduced by the state, appellant kept silent. Instead, he chose to deny participation in the hold-ups, and, indeed, stated that he never even saw Bates' confession until the preliminary hearing.[6/] Moreover, even assuming arguendo, that Officer Rainey called him "chicken" because he would not "clean up the books," such a statement scarcely amounts to a threat or such coercion as to render his admissions of guilt involuntary.

II.

NEITHER THE RIGHT TO CONFRONTATION NOR THE RIGHT TO CROSS-EXAMINATION ENUNCIATED IN POINTER v. TEXAS, 380 U.S. 400 (1965) AND DOUGLAS v. ALABAMA, 380 U.S. 415 (1965) WERE VIOLATED BY THE INTRODUCTION OF APPELLANT'S ACCOMPLICE'S CONFESSION.

Appellant has also urged that his constitutional right of confrontation and to cross-examination enunciated

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6. It may be noted that even before this Court appellant is somewhat less than accurate in his charges. For although he indicated at his trial that Officer Rainey was not the arresting office (as Officer Rainey so testified [RT II 28]), or, at the very least, that Officer Rainey was not the one who informed him of the charges for which he was arrested (RT II 51-52), he now has concocted quite an elaborate story in his brief as to what Officer Rainey told him when he arrested him in Los Angeles (AOB 3).

in Pointer v. Texas, supra, and Douglas v. Alabama, supra, were violated by the introduction into evidence of his accomplice's confession at a time when his accomplice was not produced for cross-examination during the trial. However, as the record establishes, and as the district court so found, appellant has been somewhat less than accurate as to what transpired during his trial. When his claim is examined in the light of what actually happened at his trial, it is clear that appellant was not deprived of any constitutional right.

Thus, as set forth above, Officer Rainey had two conversations with appellant at the Newton Street Station where appellant was booked, during the latter of which appellant orally admitted his guilt. The next day, at 9:50 a.m. in Room 606, at the Record Office of the Superior Court Criminal Clerk in the Hall of Justice, Officer Rainey showed appellant the confession of his accomplice, William D. Bates. Bates' confession set forth the details of the robberies and implicated appellant. When shown the confession appellant stated that it was a true account of the robbery except for the fact that he and Bates had split the money evenly, rather than he (appellant) having received more of the robbery "loot" as Bates had stated in the confession (RT II 33-40).

Thus, as shown by the trial transcript, Bates'

confession, which was then read to the jury but which the jury was not permitted to take with them to the jury room, was placed before the jury only because of appellant's reaction to it, and because appellant had orally adopted the confession as his own. It was necessary to have Bates' confession before the jury, not because Bates was offered as the testimonial witness, but in order to have appellant's admissions in response placed in context. Cf., Kerrigan v. Scafati, 247 F.Supp. 713, 721 (D. Mass. 1965), aff'd 364 F.2d 759 (1st Cir. 1966), cert. denied, 385 U.S. 953 (1966).

Thus, as the district court stated, the confession of Bates was introduced only because there had been an adoptive admission by the affirmative conduct of the defendant, which is permissible under the California Rules of Evidence.[7/] Under these circumstances, the constitutional right to confrontation and cross-examination, set forth in the Pointer and Douglas cases, do not apply since the jury was only to consider the evidence if it was determined to be an admission or confession of the appellant himself (RT II, 62-63, RT III, 15-16). Confrontation or cross-examination of Bates would be totally irrelevant to the purpose for which his confession was used. Thus, appellant's

7. See e.g. former section 1870 of the Code of Civil Procedure, now section 1221 of the Evidence Code (effective January 1, 1967).

contention in this respect is totally without merit.

III.

THE DISTRICT COURT PROPERLY REFUSED TO HOLD AN EVIDENTIARY HEARING AND TO APPOINT COUNSEL FOR APPELLANT.

Following this Court's order for "further proceedings not inconsistent with the opinion of the Court", the District Court issued a show cause order to appellee. A return to the district court's order, the state court record, and documents filed by appellant (see infra, p. 4) were then before the District Court in reaching its decision.

Nevertheless, appellant contends that the district court erred in refusing to hold a full evidentiary hearing and to appoint counsel to represent him in the proceedings. We submit, however, that such a course of action was not required, since the record before the district court was clearly sufficient to support its decision that neither of appellant's contentions were meritorious, as a matter of law.

First, of course, an evidentiary hearing was clearly unnecessary to determine whether either the Pointer or Douglas cases was applicable to the jury's consideration of Bates' confession and appellant's reaction to it. For, evidentiary hearing is clearly unnecessary in a habeas corpus proceeding when conclusions of law only are in dispute. See e.g., Ford v. Boeger, 362 F.2d 999, 1003 (8th

Cir. 1966), appeal pending, cert. denied, 386 U.S. 914 (1967). This is similarly true insofar as the legal effect of Officer Rainey's alleged remark that appellant was "chicken" is concerned.

Similarly, appellant's charges of coercion are so completely without merit in light of Officer Rainey's specific testimony at trial, on the one hand, and appellant's failure to raise the issue at trial on the other, and no explanation for his failure to do so, since then, that an evidentairy hearing is not required. On the contrary, a district court may properly dismiss a petition for writ of habeas corpus without an evidentiary hearing, if its examination of the trial transcript discloses that the grounds of relief are without merit. Townsend v. Sain, 372 U.S. 293 (1963); United States v. Pate, 362 F.2d 89 (7th Cir. 1966). This is particularly true if the factual allegations are "patently frivolous or false in a consideration of the whole record" Commonwealth of Pennsylvania, ex rel. Harmon v. Claudys, 350 U.S. 116, 119 (1963); Webb v. Crouse, 359 F.2d 394 (10th Cir. 1966). Under circumstances such as the present, therefore, where an evidentiary hearing is not required, it seems clear appellant was not entitled to counsel, which, of course, is not a matter of right in federal habeas corpus proceedings. See e.g., Eskridge v. Rhay, supra, at 782; Ratley v. Crouse, 365 F.2d 320 (10th Cir. 1966).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the writ of habeas corpus should be affirmed.

DATED: October 16, 1967.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: October 16, 1967

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